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In the Supreme Court of the
United States

October Term, 1963

THE BOEING COMPANY,
formerly Boeing Airplane Company,

Petitioner,

vs.

THE REMEDIATION BOARD OF
THE UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

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No. 870

In the Supreme Court of the United States

OCTOBER TERM, 1963

THE BOEING COMPANY,
formerly Boeing Airplane Company,

Petitioner,

vs.

THE RENEGOTIATION BOARD OF
THE UNITED STATES OF AMERICA,

Respondent.

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REPLY BRIEF FOR PETITIONER

ARGUMENT

1. The parties are in agreement that decisions of the Court of Appeals for the District of Columbia Circuit limited judicial review in renegotiation cases to constitutional and jurisdictional issues. Respondent states (Br. in Opp., p. 9) that this Court in *United States v. California Eastern Line, Inc.*, 348 U.S. 351, approved this limitation. The Supreme Court decision in no way supports this statement, and the question whether judicial review in renegotiation cases should be limited to constitutional and jurisdictional issues remains an important question of renegotiation law upon which this Court has not yet ruled. It is a question squarely presented by the petition filed in this case which this Court should review and decide.

In *United States v. California Eastern Line, Inc., supra,*

this Court noted that the Renegotiation Act precluded review—"with meticulous clarity"—of Tax Court determinations of "the amount, if any, of excessive profits." The Supreme Court then posed the specific question—was a determination that a contract between California Eastern Line and the British Ministry of Transport was a renegotiable contract, a determination of "the amount, if any, of excessive profits"? The Court concluded that it was not, and therefore that it was reviewable. Nowhere, expressly or by implication, did this Court approve a limitation of review to decisions on constitutional or jurisdictional issues.

The Court noted that in making determinations of excessive profits (348 U.S. 354, 355):

> "[The Tax Court] must decide *at least* two separate but interrelated questions: (1) Whether a renegotiable contract is involved, and (2) the amount if any of excessive profits." (Emphasis added.)

The Court held that the Act precluded review of a decision of the second question, but that the decision for which review was sought was not of that character. Respondent would interpret *California Eastern Line* as holding that *all* subsidiary determinations made in a renegotiation case, if not on jurisdictional or constitutional issues, are *necessarily* determinations of the amount, if any, of excessive profits. This Court did not so hold, and should not now.

Petitioner's interpretation of *United States v. California Eastern Line, Inc., supra*, is supported by *Davis, Administrative Law Treatise*, Vol. 4, Para. 28.14, pp. 73, 74, in which the author states the following with respect to the *California Eastern Line* decision:

> "The Court is surely right in saying that renegotiation cases involve 'at least' two questions but the two questions the Court speaks of are more 'interrelated'

> than they are 'separate.' The Court was speaking logically when it said in *Macauley v. Waterman Steamship Corp.* [327 U.S. 540, 544] that 'a decision as to what are and are not [re]negotiable contracts is an essential part in determining the contractor's excessive profits.' *This difficulty, together with the existence of many questions in addition to the two the court discusses, deprives the California Eastern opinion of the desired clarity needed to guide the lower courts.* . . . "Even so, the Court's opinion probably is to be preferred to an adoption of the idea that questions of jurisdiction are reviewable but not other questions. The concept of jurisdiction provides no logical point at which the door is to be closed to prevent a de novo review of nearly all questions, for if a contract is not within the Act, or if it is exempt, or if the period of limitation has run, or if the profits are not 'excessive,' the Tax Court is without jurisdiction to issue a renegotiation order. Indeed, applying logic to the concept of jurisdiction leads to review even of a disputed question of the amount of profits, for if the contractor had no excessive profits the Tax Court can be deemed without jurisdiction to issue a renegotiation order." (Emphasis added.)

An interpretation of *United States v. California Eastern Line, Inc., supra*, which would approve the constitutional-jurisdictional test created by the District of Columbia Circuit, would perpetuate all of the uncertainties inherent in basing determinations of the scope of review on a classification of issues as jurisdictional or nonjurisdictional. Thus, in *City of Yonkers v. United States*, 320 U.S. 685, 695, Mr. Justice Frankfurter stated:

> "The opinions in Crowell v. Benson . . . and the casuistries to which they have given rise bear unedifying testimony of the morass into which one is led in

> working out problems of judicial review over administrative decisions by loose talk about jurisdiction."

See also *Estep v. United States*, 327 U.S. 114, 142.

2. Whether Pub. L. 87-250, referred to at page 11 of Respondent's Brief in Opposition, was intended to broaden the scope of judicial review in renegotiation cases filed after July 3, 1962 is open to doubt. Senator Douglas, making the minority report, opposed the amendment to the Renegotiation Act, stating (Sen. Rept. 1669, 87th Cong., 2d Sess., p. 8):

> "Since the proposed amendment would, on its face, merely codify the existing law as declared by the Supreme Court, it does not appear to me to be necessary."

In addition, Congressman Mills, speaking in explanation of the amendment, noted that it was prospective in effect only, and added:

> "No inference is to be drawn as to pending cases due to the enactment of this provision." (Cong. Rec., 87th Cong., 2d Sess., June 30, 1962, p. 11502.)

In any event, the importance of this case cannot be downgraded by suggesting that the issues raised are of limited application and of no prospective importance. The Court's action in this case will affect pending cases involving an era of renegotiation—the Korean and post-Korean period—second only in importance to the World War II period. Of course the specific issues may vary between cases (see Br. in Opp., p. 12). But errors of law and arbitrary and capricious action on the part of the Tax Court may be involved in all of them. Whether and to what extent such errors may be reviewed remains an open question, but one of surpassing importance to a major segment of the defense industry, which this Court should decide.

3. Lastly, respondent contends that the Tax Court determination in the instant case, though it eliminated about one-quarter of petitioner's 1952 profits, left the petitioner with a substantial amount remaining, so that petitioner can have no cause for complaint, and should be given no opportunity for redress.

There can be only one answer to this contention. If renegotiation has become a proceeding in which errors of law are irrelevant, in which arbitrary and capricious action may go unchallenged, and in which the Renegotiation Act itself may be disregarded with impunity, provided only that the amount of profits recaptured is not so large as to be confiscatory, then renegotiation has become an instrument of oppression and an abuse of power.

The warning issued by this Court in *Lichter v. United States*, 334 U.S. 742, 754, in upholding the constitutionality of the World War II renegotiation acts, has current relevance:

> "In procedure which affects property rights as directly and substantially as that authorized by the Renegotiation Act, the governmental action authorized, although resting on valid constitutional grounds, is capable of gross abuse. The very finality of the administrative determinations here upheld emphasizes the seriousness of the injustices which can result from the abuse of the large powers vested in the administrative officials. . . . We re-emphasize that, under these conditions, there is great need both for adequate channels of procedural due process and for careful conformity to those channels. . . . Within procedure thus authorized by the Constitution, the Congress and the Administration, and here affirmed, resulting injustices can and should be carefully examined and as far as possible relieved."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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